No. 15912

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CONTINENTAL TRADING, INC., *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE PETITIONER

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Opinion Below

The Memorandum Findings of Fact and Opinion of the Tax Court of the United States (R. 43-55) are reported as T. C. Memo 1957-164, filed August 30, 1957.

Jurisdiction

The Commissioner determined deficiencies in income tax of the taxpayer in the amounts and for the years as follow:

Year	Deficiency
1948	$ 208,300.59
1949	151,559.71
1950	114,468.53
Total	$ 474,328.83

(R. 14-16)

Taxpayer was advised of this determination by statutory notice of deficiency dated June 28, 1954 (R. 11-18). On November 4, 1954, which was within the 150-day period allowed by the statute for filing petition, the taxpayer filed petition in the Tax Court for redetermination of such deficiencies under the provisions of Section 6213(a) of the Internal Revenue Code of 1954 (R. 6-14). After the hearing, the Tax Court decided, on September 4, 1957, that the deficiencies in income tax as determined by the Commissioner should be sustained (R. 56). Within three months thereafter, i.e., on December 3, 1957, a Petition for Review by this Court was filed by the taxpayer (R. 86-88).

Jurisdiction of this Court is invoked under Sections 7482 and 7483 of the Internal Revenue Code of 1954. Venue lies here under Section 7482(b)(1) because the taxpayer's returns for the taxable years were filed, respectively, in the office of the Collector of Internal Revenue for the First District of California at San Francisco, California (1948) and in the office of the Collector of Internal Revenue for the District of Nevada at Reno, Nevada (1949 and 1950), both of which offices are within the geographical confines of this Circuit.

Questions Presented

I. Was petitioner a resident foreign corporation engaged in trade or business in the United States during the taxable years?

II. Did the Tax Court abuse its discretion by refusing to relieve petitioner of its judgment for the purpose of receiving additional testimony with respect to Question I? This question involves not only the propriety of the Tax Court's refusal but also the question of the appropriate norm to be used in such matters. With respect to the latter point, petitioner asserts that the *Rules of Civil Procedure*

should have been followed by the Tax Court in this regard.

III. Is petitioner entitled to deduct certain amounts accrued for interest, expenses and losses?

Statutes and Regulations

The pertinent statutory provisions and Regulations appear in Appendix A at the end of this Brief.

Statement

The facts, so far as pertinent to the issues here, were found by the Tax Court as follows:

Petitioner, a Panamanian corporation organized in May, 1947, maintained its principal office in Mexico City, Mexico. It filed Federal income tax returns in the United States, the return for 1948 being filed with the Collector of Internal Revenue for the First District of California and the returns for 1949 and 1950 being filed with the Collector of Internal Revenue for the District of Nevada. Those returns stated that petitioner was a resident foreign corporation with "investment" as its principal activity. (R. 44.)

In March, 1948, petitioner established an American address in Reno, Nevada, employed a resident agent there and qualified as a foreign corporation in that state; it continued to be so qualified until March, 1951. (R. 44).

Grover Turnbow, a United States citizen, was petitioner's president during the taxable years (R. 23, 44). Turnbow maintained offices in Oakland, California, where he was associated with various enterprises interested in erecting recombined milk plants in foreign countries. After March, 1948, petitioner's name was added to the business names already appearing on Turnbow's office door. Turnbow was president and sole stockholder of one of these other concerns, International Dairy Supply Co. (R. 44-45)

The person ultimately interested in the success of petitioner was Axel Wenner-Gren.[a] Wenner-Gren held substantial amounts of stock in the Electrolux and Servel corporations prior to petitioner's incorporation as well as sizable and diverse holdings in Mexican and other foreign enterprises. (R. 45-46.)

Prior to the incorporation of petitioner, Turnbow had served as attorney-in-fact for Wenner-Gren in the United States in connection with negotiating loans in this country. Turnbow had become acquainted with Wenner-Gren in Mexico when Turnbow had erected a recombined milk plant in which Wenner-Gren had a financial interest. Petitioner[b] was interested in financing the erection of recombined milk plants in foreign countries but during the taxable years that program failed to materialize because of the inability

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[a] Petitioner has substituted this sentence for the following sentence found by the Tax Court: "Petitioner represented the incorporation of part of the vast holdings of Axel Wenner-Gren, an internationally famous financier whose wealth was over $1,000,000,000.00". This finding by the Tax Court is of doubtful propriety and appears to petitioner to be utterly irrelevant to the issues involved. It is, moreover, based upon the admitted hearsay testimony of Turnbow who was scarcely in a position to have personal knowledge of the facts contained in the finding. (R. 221) The Tax Court's holding is also ambiguous. It is not clear whether the Court intended to find that Axel Wenner-Gren was a direct stockholder in petitioner or whether it was intended to be suggested that he was the ultimate and indirect party at interest. Perhaps the best that can be said is that the Court simply adopted the inartful and unsupported testimony of Turnbow without realizing the ambiguity. As a practical matter, Wenner-Gren was not a direct stockholder of petitioner during the taxable years as the stock record book would disclose.

[b] Petitioner has substituted in this finding of fact the word "petitioner" for "Turnbow". What Turnbow and his various enterprises were interested in doing is of no immediate materiality in this proceeding. It is not clear why the Tax Court made such a finding in the teeth of Turnbow's testimony relating to *petitioner's* interests and activities in that area. For authority for the proposition that it was petitioner rather than Turnbow whose name should have been used in the findings, see the following Record citations: R. 189-194, 203.

to reconvert foreign currency into American dollars and the instability of foreign currencies.[c] (R. 45)

Turnbow hoped [d] that petitioner would assist in financing his construction program of foreign recombined milk plants, but this did not materialize.[e] (R.45-46)

At the beginning of 1948 petitioner was obligated on bank loans in the United States as follows: Bank of America, N. T. & S. A. $1,100,000; Central Hanover Bank & Trust Company, New York, $480,000.00; Teleric, Inc., $926,000.00. The Hanover loan was liquidated during 1948, the loan from Teleric remained outstanding as of the end of 1950 and the loan from Bank of America was paid in August, 1948. (R. 46)

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[c] The affidavit of Birger Strid (R. 84-86) suggests an additional reason for the failure of the program to erect recombined milk plants in foreign countries. That reason was the United States government's program of giving away milk and milk products on a world-wide basis.

[d] The impression given is that Turnbow had originated the concept of dehydrating milk and then recombining it to produce whole milk and that he sought to bring this activity to the attention of petitioner and Wenner-Gren. Precisely the converse was true. Wenner-Gren's activities, antedating association with Turnbow, had involved milk dehydration and recombining. Petitioner had been created by Wenner-Gren to implement his plans for international distribution of dehydrated milk products under the auspices of the United Nations. It was intended to act as a purchasing and selling agent in the United States for milk and milk products and also to serve as a financial reservoir for the international milk operations of Wenner-Gren (Affidavit of Wenner-Gren, R. 82-84; Affidavit of Strid, R. 84-86) Apparently, Turnbow had been employed by Wenner-Gren and then petitioner to assist in the United States phase of the program although this is somewhat difficult to ascertain from the record, due to the bombastic testimony of Turnbow.

[e] This finding by the Tax Court simply emphasizes the strange flavor given to the case by the one-sided testimony of Turnbow. Yet even Turnbow's testimony indicates that he traveled world wide during the taxable years seeking to implement *petitioner's* program of constructing recombined milk plants in various foreign countries. (R. 192-193) The fact that Turnbow hoped that petitioner would assist in financing *Turnbow's* program if *his* program for the establishment of recombined milk plants in foreign countries proved feasible simply puts the shoe on the wrong foot. Perhaps it also explains the ultimate falling out between Turnbow and Wenner-Gren.

During 1948, 1949 and 1950 petitioner had no paid employees in the United States except Turnbow, who received $1,500.00 per month as salary during the last six months of 1950 only. This salary represented part of an over-all settlement effectuated in June, 1950, between Turnbow and Wenner-Gren as individuals, under which Turnbow was to receive stock and cash totalling $105,000.00. (R. 46, 245-6.)

Records maintained in the United States by petitioner consisted of bank statements, checkbooks and certain documents pertaining to transactions within the United States, all in the care of Turnbow's secretary at Oakland, California. Petitioner maintained bank accounts in the United States at the First National Bank, Reno, Nevada and at the Bank of America, N. T. & S. A. in San Francisco. (R. 47)

Petitioner's only assets in the United States at the end of 1948 consisted of Electrolux and Servel stock and the two bank account balances (R. 47).

On its United States tax returns for the taxable years in question, petitioner reported that it derived more than 50 percent of its gross income from sources outside the United States. Gross income from sources within the United States was reported as follows:

Year	Amount
1948	$ 817,791.39
1949	605,635.10
1950	446,863.19

(R. 47)

In 1948 petitioner received dividends on Electrolux and Servel stock aggregating $823,635.50 and incurred a net loss of $5,844.11 resulting from sales of property other than capital assets. In 1949 petitioner received $602,125.50 in similar dividends and received $3,509.90 of "other in-

come in the United States''. Of 1950 income, $441,624.00 represented dividends from Electrolux and $5,239.19 represented additional income ''from sales''. (R. 47)

During 1948 petitioner's activities in the United States included the following:[f]

(a) it collected dividends on Electrolux and Servel stock;

(b) made payment of principal and interest on outstanding loans;

(c) in May it borrowed one million dollars from the Bank of America which was used in acquisition of Mexican telephone companies;

(d) on August 6 it borrowed $1,850,000.00 from the Bank of America, of which it used $1,100,000.00 to repay prior indebtedness of Wenner-Gren to the Bank which petitioner had assumed. The same day petitioner drew checks in excess of the balance of $750,000.00 to make payments of principal and interest on other outstanding indebtedness. (R. 48)

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[f] Not included in the Court's Findings but referred to in the offer of proof made at the argument on petitioner's motion for leave to file motion (R. 256 *et seq.*) are the following additional activities of petitioner referable to this year: (1) in 1948 petitioner loaned more than $600,000.00 to two of its subsidiaries in Mexico to permit them to purchase dehydrated milk powder in carload quantities in the United States (R. 278); (2) in 1948 petitioner negotiated in New York City with a factor to obtain a loan of $350,000.00 in connection with milk operations in Mexico (R. 278); (3) during this year negotiations were under way, conducted in the greater part by Wenner-Gren. These negotiations involved petitioner's attempt to acquire and merge the two independent telephone companies then operating in Mexico. In connection with this effort Wenner-Gren visited the United States on several occasions to negotiate with International Telephone & Telegraph Company, parent of one of the two operating companies in Mexico. Wenner-Gren was specifically authorized to conduct these negotiations for petitioner as shown by the Minutes of the Board of Directors. (R. 278-279)

During 1949 petitioner's activities in the United States included the following:[g]

(a) collected dividends on Electrolux and Servel stock;

(b) made payments on principal and interest on outstanding loans;

(c) secured and repaid short-term advances from Turnbow;

(d) in September it borrowed $1,700,000.00 from the Bank of America which was used to liquidate the outstanding balances of two loans from that Bank;

(e) In December it sold its 55,000 shares of Servel stock, heretofore pledged with the Bank of America to secure loans, and used the proceeds of the sale to pay outstanding obligations to the Bank. (R. 48)

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[g] Not included in the Court's Findings, but referred to in the offer of proof made at the argument on petitioner's motion for leave to file motion (R. 256 *et seq.*) are the following additional activities referable to this year: (1) In 1949 petitioner owned a race track in Mexico City known as the Hippodrome. In that year extensive attempts were made to sell control of this track in the United States. Turnbow conducted these negotiations which unfortunately did not result in a sale (R. 271); (2) in 1949 Turnbow and others negotiated an attempted sale of a subsidiary of petitioner known as The Bank Continental in the United States. Some of the negotiations in this connection were carried on in New York City (R. 272-273); (3) in 1949 attempts were made in the United States to sell another of petitioner's assets, namely the Pan-American Trust Company, which was owned beneficially or controlled by petitioner. Negotiations with respect to this matter were conducted with New York banks (R. 277); (4) also in 1949 Turnbow negotiated with Tidewater Oil Company in the United States in an attempt to get it into the oil business in Mexico under petitioner's auspices. These negotiations were fairly extensive (R. 277); (5) During 1949 Turnbow tried unsuccessfully to interest petitioner in buying the stock of the Golden State Dairy in California. That dairy is now merged into Foremost Dairies forming one of the largest milk combines in the world. Turnbow is president of that concern today (R. 277); (6) in 1949 negotiations were conducted with respect to the acquisition of the telephone companies. These negotiations were conducted primarily by Wenner-Gren (R. 278-279).

In 1950 petitioner's activities in the United States included the following: [h]

(a) it collected dividends on Electrolux stock;

(b) made payments on principal and interest on outstanding loans;

(c) on January 3 it borrowed $2,000,000.00 from the Central Hanover Bank using $1,700,000.00 of the proceeds to repay a loan of the same amount from the Bank of America. Approximately $400,000.00 was transferred to petitioner's account in Mexico City, $110,000.00 was transferred for the account of a Swedish bank and approximately $275,000.00 was transferred to petitioner's account at the Bank of America, much of which was thereafter transferred to petitioner's Mexican accounts;

(d) Petitioner repaid the two million dollar loan. In negotiations with the Central Hanover Bank petitioner represented itself as a Panamanian corporation doing business in foreign countries. (R. 48-49) [i]

In July, 1948, petitioner engaged in a transaction of a type in which it was not previously nor subsequently en-

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[h] Not included in the Court's Findings but referred to in the offer of proof made at the argument on petitioner's motion for leave to file motion (R. 256 *et seq*) are the following additional activities of petitioner referable to this year: (1) In 1950, three years of continuous negotiations culminated in the successful attempt by petitioner to acquire and merge the two largest telephone companies in Mexico into one concern. Much of these negotiations occurred in New York City where Wenner-Gren was dealing with the International Telephone and Telegraph Company, parent of one of the Mexican companies.

[i] At this point on page 49 of the Record appears the following brief paragraph: "The funds borrowed by petitioner were in the main used by Wenner-Gren. Turnbow had no direct knowledge of their use." Petitioner has deliberately eliminated that paragraph from these facts. The first sentence is completely gratuitous and petitioner is unable to find any support whatsoever in the Record for the conclusion. The second sentence is irrelevant and immaterial to the issue before the Court. Apparently, the Court below relied upon the inconclusive hearsay testimony of Turnbow on page 251 of the Record which is, incidentally, not the best evidence.

gaged. It purchased a carload of dry milk fat from Kraft Foods Company for $46,212.75. One month later through a company in which Turnbow was interested, petitioner resold the fat to Kraft for $40,248.00. The drop in value was due to a decline in the market.[j] Kraft was requested to make the check payable to petitioner. Petitioner reported the loss on its 1948 tax return. (R. 49)

As an accommodation to a Mexican corporation, petitioner purchased in 1950 equipment for that corporation for which it was reimbursed without profit (R. 49).

In each year, the only other activity reported by petitioner was represented by nominal amounts of income resulting from transactions relating to cans used by Supply. In 1948 such reported income amounted to $120.64. In 1949, $3,509.90 was reported and in 1950, $5,239.19 (R. 49-50).

Supply found it necessary, commencing in 1948, to obtain tin cans in connection with its contract for supplying recombined milk products to troops in the Far East. The contract set forth specifications for the necessary cans to be bought in the United States. In 1948 Supply procured cans from the Western Can Company. In December, 1948, petitioner undertook to place with Western[k] an order covering the same type of cans and bearing the same markings as Supply had theretofore ordered in its own name from Western. Western billed petitioner at the same price which Supply had paid Western on an earlier order. Petitioner's order was telephoned to Western by either Supply's procurement department or Turnbow's secretary on December 8, 1948. (R. 50)

The same day that petitioner's order was telephoned to

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[j] Petitioner has added this sentence which was not contained in the Tax Court findings, but see R. 251.

[k] At this point the Tax Court had the phrase "in its name". Petitioner has deleted that clause here because it is meaningless.

Western, Supply prepared an export purchase order for the cans addressed to petitioner. Petitioner then forwarded to Western a written confirmatory order in its name and on December 16, 1948 paid Western by check for the cans. Petitioner invoiced Supply for the cans at a 5 percent increase in price and Supply paid the invoice within 10 days of the invoice date. (R. 50-51)

In 1949 and 1950 petitioner utilized the same recording and routing of orders for cans needed by Supply. This occurred on 37 occasions in 1949 and 53 occasions[1] in 1950. Petitioner regarded the proceeds as income and reported the profit from the sales of the cans on its tax returns for the respective years. Supply in every instance paid petitioner within 10 days of petitioner's payment to Western. After 1950, Supply recommenced ordering and purchasing cans directly from Western.[m] (R. 51) Petitioner also purchased and resold 3 carloads of tins to another company, Farmers Co-op Creamery, one carload in 1949 and two in 1950.[n]

During the taxable years petitioner maintained a *de facto* business office in Oakland, California which was

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[1] "Occasions" as used here by the Tax Court also means "carloads". A carload was shipped on each occasion. See Stipulation 16, X and parts thereof. The Tax Court found 48 occasions for 1950.

[m] In connection with the finding contained in this paragraph it must be indicated that petitioner has deliberately omitted the following sentences appearing in the Tax Court findings: "There was no business purpose connected with the can transactions engaged in by petitioner. It never used its Nevada office in these operations. It carried no inventory of cans and ordered no cans other than those used by Supply." The first sentence deleted contains an unsupported conclusion. The second sentence appears to be utterly meaningless, as the negotiations in connection with the cans were handled through Turnbow's offices in California. The last sentence is deleted because the absence of inventory in these types of situations is meaningless as a matter of law. See discussion of this point in Argument I-A.

[n] This was not found by the Tax Court but see Stipulation, Ex. XXVIII, p. 3, Note 2.

located in the office of its president, Grover Turnbow; in that office both Turnbow and his secretary devoted a considerable amount of time and activity to the interests and activities of petitioner (R. 120-124). In connection with these activities various miscellaneous office expenses were incurred, including postage, insurance, telephone, telegraph, legal, printing, photostating and travel (Stipulation 16, XIV and Ex. XXXI, thereof). In addition to Turnbow, petitioner's president, M. W. Dobrzensky, petitioner's vice-president (R. 44) and Franklin A. Schulze, petitioner's secretary-treasurer (R. 179) were located in California. During the taxable years petitioner's president negotiated 7 bank loans aggregating $6,800,000, negotiated the sale of 55,000 shares of Servel stock, negotiated the purchase of one carload of fat and the resale thereof, negotiated the purchase of equipment for a foreign corporation, negotiated the purchase and sale of 91 carloads of tin cans at a profit, drew 179 checks against one bank account aggregating $2,209,036.52, drew 20 checks against another bank account aggregating $2,065,987.97, paid miscellaneous office expenses as indicated, maintained surveillance of the collection of cash dividends on stock owned by petitioner aggregating $1,867,385.00, repaid various loans of petitioner and made payments of interest thereon, negotiated in his California office and abroad in connection with petitioner's endeavor to establish foreign recombined milk plants.[o] (Stipulation 14, 15, 16, R. 189-193)

During 1948, 1949 and 1950 petitioner was engaged in a trade or business within the United States within the meaning of Section 231(b) of the Internal Revenue Code.[p]

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[o] The facts contained in this paragraph were not found by the Court below but are clearly evident from the Record or were stipulated.

[p] This is precisely the converse of what was concluded by the Tax Court and petitioner asserts that it is the correct conclusion based upon the Record.

Statement of Points to be Urged

I. The Tax Court erred by holding that petitioner was not engaged in a trade or business within the United States within the meaning of Section 231(b) of the Internal Revenue Code.

II. In reaching that holding the Tax Court erred by failing to base such holding upon substantial evidence and as a result it was clearly erroneous.

III. The Tax Court erred by failing to relieve the petitioner of its judgment as required by the *Rules of Civil Procedure* because of mistake, inadvertence, newly discovered evidence, or other valid reason for reopening the Record and taking additional testimony to prevent an unjust result.

IV. The taxpayer desires to preserve its right seasonably to argue the deductibility of certain expenses, interest and losses; this issue was neither reached nor decided by the Court below, but will have to be in the event the trade or business holding is reversed.

Summary of Argument

As a foreign corporation, petitioner sought to and did engage in a trade or business in the United States. That business had originally been intended to include the purchase of milk and milk products in the United States, particularly dehydrated milk, as well as the financing of such activities through other corporations, together with the erection and operation of recombined milk plants in milk-deficient areas of the world under the auspices of the United Nations. Due to various adverse factors the milk program never reached fruition but petitioner, nevertheless, besides negotiating extensively in the foregoing connection also engaged in other activities in the United States, with the result that the combination of its various activities constituted a trade or business in this country.

During the taxable years 1948, 1949 and 1950, it qualified as a foreign corporation with a resident agent in Nevada and had an office in California. Three officers of petitioner resided in California and the president of petitioner, one of these, devoted considerable time during the taxable years to the business affairs of petitioner in the United States.

Among the various activities carried on by petitioner in the United States during the taxable years (principally through its president) were the following:

(a) collected $1,867,385.00 in dividends upon United States stocks;

(b) engaged in financial activity including negotiation of 7 large American bank loans aggregating $6,800,000.00 and the repayment of some parts thereof, including interest;

(c) conducted extensive negotiations in the United States and abroad in connection with the projected milk program;

(d) purchased and resold 91 carloads of tin cans;

(e) purchased and resold a carload of fat;

(f) negotiated purchase of equipment for a foreign corporation;

(g) drew 199 checks against two bank accounts, which items aggregated $4,275,024.49;

(h) borrowed sizable sums from petitioner's president and repaid them;

(i) sold 55,000 shares of Servel stock; and finally,

(j) incurred and paid various miscellaneous office expenses including travel, postage, telephone and legal expenses.

Needless to say, if the Court had taken into account the additional United States activities indicated in Argument II, the situation would be *a fortiori* a trade or business.

The principal fault with the Tax Court's holding is its consistent refusal to view petitioner's activities in the United States as a composite whole rather than separately. The Court erroneously placed significance upon an alleged lack of business purpose which is refuted below. It also attributed significance to the small size of the dollar profits involved in certain transactions and failed to place proper emphasis upon the total character of the petitioner's activities.

Finally, the Court erred in finding incomplete and partially inaccurate facts and in reaching ultimate fact conclusions not supported by substantial evidence.

The Court below also erred by failing to relieve petitioner of its judgment upon a showing of reasonable cause for believing that additional, convincing and material testimony could have been presented but was not presented below, due either to mistake, inadvertence, newly discovered evidence, or other justification for invoking Rule 60(b) of the *Rules of Civil Procedure.*

The question of the deductibility of certain interest expenses and losses was neither reached nor decided by the Court below, such issue being deemed to be subordinate to the trade or business issue. If petitioner ultimately prevails

on the trade or business issue it should prevail here also or, it should be able to present evidence with respect to the deductibility of such items. The purpose of the third argument is simply to preserve petitioner's right seasonably to assert such contentions if necessary.

ARGUMENT I

The Tax Court's Decision That Petitioner Was Not Engaged in a Trade or Business in the United States Was Erroneous in Law and Not Based upon the Evidence and It Should, Therefore, Be Reversed.

This is the major area of controversy and is concerned with the mixed question of whether or not petitioner was engaged in a trade or business in the United States during the taxable years. The Tax Court below held that petitioner was not so engaged in a trade or business. Petitioner disagrees emphatically with that determination and has appealed this issue to this Court, asserting that it was engaged in a trade or business in the United States. The first portion of this argument deals with the Tax Court's holding and the basis thereof. The second portion of this argument analyzes the Tax Court's findings of fact and finds them in significant measure to be clearly erroneous.

A. *The Tax Court erred as a matter of law in holding that petitioner was not engaged in trade or business in the United States within the meaning of Section 231(b) of the Internal Revenue Code of 1939.*

Petitioner was a foreign corporation chartered in Panama, between which country and the United States there was no treaty affecting the taxation of income. Petitioner contends that it qualifies as a resident foreign corporation within the meaning of Section 231(b) of the Code.

Where a foreign corporation was a resident, that is, was engaged in trade or business within the United States, it was taxed only on net income derived from sources within the United States. Section 14(c) of the Internal Revenue Code provided that such a foreign corporation should be

taxed in an amount equal to 24 percent of the normal tax net income. Section 15 provided for a 14 percent surtax on such corporations (the surtax was somewhat higher in 1950). Both taxes were to be computed after credit for 85 percent of dividends received from domestic corporations as provided in Section 26(b).

Therefore, if petitioner qualified as a resident foreign corporation engaged in trade or business in the United States, its non-dividend United States income would be taxed at an aggregate rate of 38 percent; the dividend portion of its United States income would be taxed at 5.7 percent in 1948 and 1949 (15 percent of dividends at 38 percent) while the 1950 rate would be something over 6 percent.

Alternatively, if the government is correct and petitioner was a foreign corporation not engaged in a trade or business, it was subject to a flat 30 percent tax on gross fixed or determinable income from United States sources. (Section 231(a))

The Tax Court below found that petitioner was taxable for the years in issue under Section 231(a) rather than 231(b). The Court held that petitioner was not engaged in trade or business in the United States during the taxable years. Was the Tax Court in error in so holding? Petitioner says so.

At the outset it must be emphasized that petitioner was not organized in Panama in execution of a scheme to minimize or reduce taxes on existing United States income, as implied by the Tax Court. Not until shortly after its incorporation in 1947 did Wenner-Gren contribute any substantial blocks of stock in Electrolux and Servel corporations to petitioner. Servel and Electrolux were domestic American corporations. During the three taxable years petitioner collected dividends from these stocks (from

sources within the United States) aggregating $1,867,-385.00. Had the Wenner-Gren retained ownership of these shares during the taxable years he would have been taxed individually upon the dividends thereon at the flat rate of 10 percent under the provisions of the Swedish-United States Income Tax Convention (see Article VII of the Convention and paragraph 3 of the Protocol thereto). Such a tax would have aggregated $186,738.50.[1] The same dividends received by petitioner would be taxed at an effective rate of about 6 percent, if petitioner were a resident and at 30 percent if petitioner were a non-resident.

However, it can scarcely be supposed on the record that petitioner would have confined its United States activities solely to collecting such dividends. As far back as 1939, the Commissioner had ruled that the mere receipt of dividends on domestic stocks by a foreign corporation did not constitute engaging in a trade or business in the United States. See *IT 3260*, 1939-1 Cum. Bull. (Part 1) 199. Mani-

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[1] From the point of view of Axel Wenner-Gren it was considerably more expensive to have operated through corporate form in the United States than to have held the Servel and Electrolux stock in his own name. The actual expenses incurred by having petitioner operate in the United States, which would not otherwise have been incurred, were as follows:

Settlement with Turnbow, June 1950 (R. 46)	$105,000.00
Salary for Turnbow, last 6 months of 1950 (R. 46)	9,000.00
Legal fees, Fitzgerald, Abbott & Beardsley (R. 39, 40, Ex. XXXI)	23,107.19
Office costs, travel expenses, etc. of Oakland, Cal. office (R. 39, 40, Ex. XXXI)	7,124.70
Taxes actually paid in United States (R. 16)	85,886.58
Total	$230,028.47

If, in addition, the deficiencies here in issue are taken into account (the sum of $474,328.83 plus interest thereon) as well as costs incident to this appeal it may be seen that Wenner-Gren received no particular tax savings by transferring the American stocks to the petitioner.

festly, petitioner could not have intended its United States business activities to be confined simply to collecting dividends, else it would fail to qualify as "engaged in a trade or business". The purposes for which the corporation was formed were broader than mere dividend collecting as is indicated by the corporate charter. See R. 21-22. Moreover, the testimony of Turnbow throughout the Record indicates continuous but futile attempts to implement the recombined milk program for petitioner. The conclusion would seem to be required that there was here no real motive of tax avoidance; had petitioner's other contemplated United States activities borne fruit all such income other than dividends would have been taxed at an effective rate of 38 percent.

The Tax Court failed in its decision to follow the accepted rule that in ascertaining whether a corporation is engaged in trade or business in a given jurisdiction, its activities therein must be regarded as a *whole*—that a fagot is made of a bundle of sticks, and not that the sticks are separately broken and thrown into the discard without being assembled into a fagot. The Tax Court said (R., p. 53):

> "The detailed analysis submitted by petitioner of all of its transactions during the years in controversy shows that only items accounting for a fraction of 1 per cent of petitioner's total income represent those which by any stretch of the imagination could be considered business. See *Linen Thread Co., Ltd.* 14 T.C. 725. Such transactions resulted in no substantial gain, and considering the time spent on them they could not, and in several instances actually did not, result in even a nominal net profit."

In making this statement, the Tax Court ignored the dividends received from substantial holdings by petitioner

of domestic stocks. Although the Commissioner ruled some years ago that the mere receipt of dividends on domestic stocks by a foreign corporation does not constitute the engaging by it in trade or business in the United States *(I T. 3260,* 1939-1 C. B. (Part 1) p. 199), this activity must be considered in connection with other activities in determining whether a foreign corporation is so engaged. The statute (sec. 211(b) I.R.C. of 1939; sec. 871(c)(2) of I. R.C. of 1954, and corresponding provisions of predecessor law) has long provided that "the phrase 'engaged in trade or business within the United States' . . . does not include the effecting, through a resident broker, commission agent, or custodian, of transactions in the United States . . . in commodities . . . or in stocks or securities". But this statutory exclusion has been disregarded by the courts in instances *where the exempted activity was found to be combined with other elements.*

For example, in *Adda* v. *Com.* (CCA-4, 1948), 171 F. (2d) 457, the Court of Appeals for the Fourth Circuit held that a nonresident alien was engaged in trade or business in the United States because of the fact that there was added to his transactions in commodity exchanges the fact that these transactions were effected by his brother as his agent on American soil under a discretionary power-of-attorney vested in the brother. And in *Com.* v. *Nubar* (CCA-4, 1950), 185 F. (2d) 854,the same Court of Appeals held that extensive trading in the United States in stocks and commodities by an alien constituted the engaging by him in a trade or business, the element of *extensiveness* when added to statutorily exempt activities being deemed by the Court to override the exemption.

By parity of reasoning, the considerable activities of petitioner for the years in issue, which will be shown below, when added to the extensive receipt of dividends by petitioner on American soil should be deemed to con-

stitute engaging in trade or business in the United States.

Although it did not have to do so in seeming defiance of a statutory exemption, the Supreme Court of the United States long ago enunciated this rule of *integration* in *Edwards* v. *Chile Copper Co.,* (1926), 270 U.S. 452, in a case involving a suit for refund of taxes imposable upon domestic corporations organized for profit "with respect to carrying on or doing business." In this case, the plaintiff corporation owned the capital stock of a subsidiary operating abroad, issued its own bonds secured by the subsidiary's stock and paid over the proceeds to the subsidiary, maintained an office in the United States, held director's and stockholders' meetings here, kept certain books and accounts in the United States, and did here incidental acts necessary to maintain the corporate existence. In deciding that the plaintiff corporation was "carrying on or doing business" in the United States, a phrase obviously synonymous with "engaged in trade or business" in the United States, the Court, speaking per Mr. Justice Holmes, said:

> "*It* (the corporation) was organized for profit and *was doing what it was organized to do* in order to realize profit. The cases must be exceptional, when such activities of such corporations do not amount to doing business in the sense of the statutes . . . *we cannot let the fagot be destroyed by taking up each item of conduct separately and breaking the stick. The activities and situation must be judged as a whole* . . ."[2] (Emphasis supplied)

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[2] This rule of integration announced by Mr. Justice Holmes was followed in *Helvering* v. *Scottish American Investment Co.* (CCA-4, 1943), 139 F. (2d) 419, aff'd (1944) 323 U.S. 199, and affirming 47 B.T.A. 474 (1942). In that decision the Court of Appeals said:

> ". . . the proper approach to this problem is not to consider each activity and power separately and to analyze it apart so as to

Consider petitioner's other activities.[3]

In 1948, as found by the Tax Court (R. 48-9-50) besides collecting dividends on the large blocks of Electrolux and Servel stock, petitioner made payments of principal and interest on outstanding loans, borrowed $1,000,000 and $1,850,000, drew checks for more than $750,000 to make payments of principal and interest on outstanding indebtedness, purchased a carload of milk fat which it resold at a loss of several thousand dollars, and bought a number of tin cans which it sold a few days later at a 5% profit resulting in a small amount of income.

In 1949 (R. 48-9-50), besides collecting similar domestic dividends on a larger scale, petitioner made payments on principal and interest on outstanding loans, secured and repaid short-term advances, borrowed $1,700,000, liquidated two outstanding loans, sold 55,000 shares of Servel stock previously pledged to a domestic bank, paid outstanding obligations to a bank, and purchased and sold carloads of tin cans on 37 occasions, reaping a 5 percent profit amounting to several thousand dollars from these latter transactions.

In 1950 (R. 48-50) besides collecting large amounts of dividends on Electrolux stock, petitioner made payments of principal and interest on outstanding loans, borrowed $2,000,000 from a domestic bank, repaid a loan of $1,700,000, transferred $400,000 to its account in Mexico, made other substantial transfers of money, repaid a loan of $2,000,000, and purchased and sold carloads of tin cans on

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determine whether that one activity or power, considered alone, can be construed as casual or accidental. But *the composite picture of these activities and powers must be viewed as an integrated whole* and a solution must be sought accordingly. The strength of a rope is not that of a single strand. . . .". (Emphasis supplied)

[3] The following description of petitioner's activities is simply that as found by the Tax Court and does not, therefore, include any of those activities not covered by the Record and discussed in Argument II. The additional activities referred to would support this argument *a fortiori*.

53 occasions, deriving a profit of several thousand dollars from these latter transactions.

It is stipulated (R. 23) that Grover D. Turnbow, of Oakland, California, was president of petitioner during the years in issue. It is further shown that he attempted during the years in issue to negotiate projects for the erection of recombined milk plants to be in considerable measure financed by petitioner, which had ample funds in the United States in the form of unliquidated shares of stock and access to further ample funds from foreign sources. Under these facts, it is clear that petitioner, to use the language of Mr. Justice Holmes in *Edwards* v. *Chile Copper Co., supra,* "was a good deal more than a mere conduit" for others, and that "its brains or at least the efferent nerve without which" petitioner "could not move" in the United States existed here in the form of its president, who, according to petitioner's by-laws (R. 23, Ex. 1) was "the chief executive officer" of petitioner, had "general and active management of the business of the corporation subject to the board of directors", and the power to "execute contracts and other obligations authorized by the board." When it is further noted that petitioner, besides the power to invest in stocks, etc. (R. 22), had specific power (R. 21-22) to make and deal in milk products, and that the president negotiated, frequently on American soil (R. 189 to 194, 203-4, 211-2, 214) for projects in which petitioner was to be a principal financial participant, the conclusion seems unavoidable that petitioner was "engaged in trade or business in the United States."

This conclusion is supported by the views of the Court of Appeals for the Second Circuit in *Union Internationale de Placements* v. *Hoey* (CCA-2, 1938), 96 F. (2d) 591. The case involved the question whether a foreign corporation was engaged in trade or business in the United States,

for purposes of the former Federal capital stock tax prescribing this test for liability of foreign corporations. Although the Court decided, by assimilating the capital stock tax test to that of that of the income tax law, that the corporation there was not engaged in trade or business in the United States merely by virtue of the purchase and sale of securities in the United States by orders transmitted from abroad through resident banks and brokers acting for the public in general, nevertheless, in reaching this conclusion the Court used the following language directly applicable to the case at bar:

> "The question, therefore, arises whether or not the foreign corporation was present as a corporation within the taxing jurisdiction. Only when it is so present does it become relevant to consider the nature and degree of its business activities within the jurisdiction for the purposes of taxation. *Butler Bros. Show Co.* v. *U. S. Rubber Co.,* 156 F. 1 (CCA-8; *Procter & Gamble Co.* v. *Newton,* 289 F. 1013. To subject such a corporation to taxation for doing business, the transactions must not only show that the corporation was present, but also that it was active.
>
> "Carrying on or doing business has received construction in the cases involving the amenability of a corporation chartered in one jurisdiction to the service of process in another jurisdiction. *Tanza* v. *Susquehanna Coal Co.* 220 N. Y. 259. In such cases, as in taxation and regulation cases, it has been held essential that the foreign corporation be present as a corporation in the sense of having a place of business or a branch office or an agent or representative. *People's Tobacco Co.* v. *Amer. Tobacco Co.,* 246 U. S. 79, 86; *Henry M. Day Co.* v. *Schiff, Lang & Co.,* 278 F. 533 . . . .

> "This appellant could come into the jurisdiction and be present here only by sending into the jurisdiction or maintaining here its officers or other agents. . . ."

This is precisely what petitioner did in the case at bar. It sent into (i.e. it had in) the jurisdiction (which was the United States as a whole for purposes of the test in the instant case) its principal officer or president, its vice-president, and its assistant secretary. These persons were of course the "agents" of petitioner. The record shows that the president of petitioner as its chief executive officer was habitually in the United States as a resident thereof and acting on behalf of petitioner. This presence, combined with the qualification of petitioner in the United States, accompanied by the existence of a statutory agent in Nevada, and its habitual activities shown above, satisfy the requirements of the foregoing language from the *Union de Placements* case, *supra.*

In a very recent case, *United States* v. *Balanovski et al.*, (CCA-2, 1956) 236 F. (2d) 298, cert. den. 352 U. S. 968, the Court of Appeals for the Second Circuit held that where the partner of a foreign partnership, remaining for some time on American soil, negotiated purchases in the United States, inspected merchandise, maintained an office and a bank account, and generally did all things to complete transactions of resale, the partnership was engaged in trade or business in the United States and taxable on the profits from resales effected in this country. In this case, the partnership claimed a non-resident status, but if it had been a *corporation* claiming such the Court would clearly have reached the conclusion under the facts presented that it was a *resident* foreign corporation (i.e., one engaged

in trade or business in the United States) and would have been forced to concede that it was entitled to the 85 percent credit in respect of dividends received and to the statutory deductions permitted to resident foreign corporations—*the test, of course, being the same regardless of whether the contention of residence is raised by the government or by the taxpayer.*

In the *Balanovski* case, the year in issue was 1947, and during its course 24 transactions of purchase and resale occurred, and although they were large in amount, they were less numerous than the transactions of purchase and resale into which petitioner in the case at bar entered in 1949 and 1950, which were respectively 37 and 53 in number. In the *Balanovski* decision, the Court of Appeals said:

> "Balanovski's activities on behalf of CADIC [the partnership] were numerous and varied and required the exercise of initiative, judgment, and executive responsibility. They far transcended the routine or merely clerical. Thus he conferred and bargained with American bankers. He inspected goods and made trips out of New York State in order to buy and inspect the equipment in which he was trading. He made sure the goods were placed in warehouses and aboard ship. He tried to insure that CADIC would not repeat the errors in supplying inferior equipment that had been made by some of its competitors. And while here he attempted 'to develop other business' for CADIC.
>
> "Throughout his stay in the United States Balanovski employed a Miss Alice Devine as a secretary. She used, and he used, the Hotel New Weston in New York City as an office. His address on the documents involved in the transactions was given as the Hotel New Weston. His supplier contacted him there, and that

was the place where his letters were typed and his business appointments arranged and kept. . . ."

At another place, the Court of Appeals said of Balanovski:

". . . Acting for CADIC he engaged in numerous transactions wherein he both purchased and sold goods in this country, earned his profits here, and participated in other activities pertaining to the transaction of business. Cases cited in support of the proposition that CADIC was not engaged in business here are quite distinguishable. Cf. *The Linen Thread Co., Ltd.,* 14 T. C. 725; *Jorge Pasquel,* 12 T.C.M. 1431; *The Amalgamated Dental Co., Ltd.,* 6 T.C. 1009; *European Naval Stores Co., S.A.,* 11 T.C. 127; *R. J. Dorn & Co.,* 12 B.T.A. 1102.

The foregoing language of the Court of Appeals in the *Balanovski* opinion reveals striking similarities between the factual pattern in that case and in the case at bar. In both cases, the taxpayer concerned had an authorized discretionary agent in this country, who made a series of purchases and quick resales. In both cases the representative participated in other activities pertaining to the transaction of business. In both cases: "While maintaining regular contact with his home office, he was obviously making important business decisions." In both cases, "He maintained a bank account there for partnership [corporation] funds." In both cases: "He operated from a New York [Oakland] office through which a major portion of CADIC's [petitioner's] business was transacted."[4] The citations

[4] In the case at bar, petitioner's president "conferred and bargained with American bankers," as did Balanovski, and arranged loans and their repayments as well as the sending of money to Mexico for operations of petitioner there. The record shows (R. 25-26) that 199 checks were drawn on behalf of the petitioner during the years in issue against domestic bank accounts showing a plenitude of business transactions.

of the Court at this point seem equally applicable to both cases: "See *C.I.R.* v. *Nubar,* 4 Cir., 185 Fed. (2d) 584, 588, certiorari denied 341 U.S. 925; *Fernand C. A. Adda,* 10 T. C. 273, 277, 278, affirmed per curiam *Adda* v. *C.I.R.,* 4 Cir., 171 Fed. (2d) 457, certiorari denied 336 U.S. 952; *Pinchot* v. *C.I.R.,* 2 Cir., 113 Fed. (2d) 718, 719; *Jan Casimir Lewenhaupt,* 20 T. C. 151, 163."

It is submitted that on the basis of the decision of the Court of Appeals in the *Balanovski* case, the conclusion is inevitable that petitioner was clearly engaged in trade or business in the United States upon consideration of the totality of its business transactions. The fact that its profits from the purchase and sale of tin cans were small should be deemed to be immaterial, when added as a stick to the bundle making up the fagot. The numerous contracts for purchase were in fact made, the responsibility in law for payment was that of petitioner and moderate profits were in fact obtained on the resales. The absence of an inventory in tin cans should be disregarded as of no effect in view of the *Balanovski* decision, in which the foreign partnership there found to be engaged in trade or business in this country, carried no inventory of the equipment which it immediately resold upon purchase, merely receiving the bills of lading from the bank momentarily under trust receipt and arranging for shipment to the ultimate foreign buyer, which paid the freight and insured the equipment in transit, with the domestic bank retaining control in transit through return to it by the partner of the bills of lading taken under trust receipt.

Even if Mr. Justice Holmes' accepted theory of consideration of the totality of activities were erroneously disregarded in the case at bar, and the stick of transactions in tin cans were considered alone, the Tax Court itself has clearly found in a recent decision that the smallness of

income (profits) does not preclude a trade or business activity in the United States.

In *Frank Handfield* (1955), 23 T.C. 633, the petitioner there involved was a citizen and resident of Canada, who manufactured post cards in Canada which were shipped on consignment to the United States under an agreement between him and an American news company, under which it was found that the news company was petitioner's exclusive agent for distributing petitioner's cards in the United States to dealers who attempted to sell the cards. The year in issue was petitioner's fiscal year ending July 31, 1949. The proceeding in the Tax Court involved a deficiency of only *$639.70.* Petitioner had shown net income of only $883.70, after claiming deductions of $2,800, $171.67, $1,200, and $667.70. Yet no principle of *de minimis* prevented the Tax Court from holding not only that petitioner was engaged in trade or business in the United States because of the presence here of the domestic agent, but that he was so engaged through a "permanent establishment" within the meaning of the Canadian-United States income tax convention, with the consequence that despite the limitations of the convention on double international taxation of the same profits, United States tax applied. It therefore ill becomes the Tax Court to have held below in the case at bar that (R. 53):

> ". . . Such transactions resulted in no substantial gain, and considering the time spent on them they could not, and in several instances actually did not, result in even a nominal net profit."

In other words, the lack of a *substantial gain* was deemed of no consequence by the Tax Court in the *Handfield* case when it found that taxpayer to have been engaged in trade or business in the United States, and this fact seems to

have been overlooked by it when it rendered the decision below in the case at bar. As to the statement that the transactions (meaning those in cans, and that in milk fat) could not, and in several instances actually did not, result in even a nominal net profit, the attention of the Court is called to the fact that apart from the sale at a loss of about $6,000 in 1948 of a carload of milk fat, petitioner's purchases and resales in question (those of cans) resulted in a small profit in each of the years in issue (R. 49-50). The only other transaction of purchase of tangible goods seems to have been a purchase purely as an accommodation for a Mexican corporation (doubtless related) in which no profit was desired, and certainly such a transaction casts no stigma on the fagot. The mere recitation of these facts seems a refutation of the foregoing quotation from the Tax Court.

With further reference to the question of *quantum* of profits as an element in the phenomenon of engaging in trade or business, the attention of the Court is directed to a recent decision of a sister Court of Appeals—that of the Seventh Circuit in *Reiner* v. *U. S.* (CCA-7, 1955), 222 F. (2d) 770. In this case the taxpayer had constructed a house in Austria in 1937, and until she left Austria in 1938 (probably because of the Anschluss with Germany) the house was used partly as her residence and partly as the medical office of her husband. When the taxpayer left Austria in 1938 she appointed a doctor to manage the property for her, who rented it to several tenants. In 1944, the house was severly damaged by a bomb. The Court of Appeals held that the taxpayer's loss was attributable to the operation of a trade or business regularly carried on by her, and that the loss in 1944 could therefore be carried back and forward to other years within the meaning of the applicable Federal tax statute (sec. 122, I. R. C. of 1954). It had been found below that the basis for the residence

was about $51,000, and that the loss from bombing was about $36,000. From this it seems manifest that the income per annum from the operation of this single house was relatively small in amount, a few thousand dollars each year.

The Tax Court itself, in *Anders I. La Greide* (1954), 23 T.C. 508 had already clearly rejected the theory of *de minimis* when ascertaining that the taxpayers (husband and wife) had reported rental receipts for 1949 of *$250,* diminished by $20 of repairs, all related to a single inherited house. Knowing the triviality of the amount involved, the Tax Court nevertheless said:

> "The first issue to be considered is whether or not the renting out in 1949, by Alice LaGreide, of a single piece of residential real estate, amounted to the operation by her of a trade or business regularly carried on. She inherited the property from her mother in 1948 . . . Since the time of the mother's death, the property was either rented or available for renting, and was actually rented during part of 1948 and almost all of 1949.
>
> "It is clear from the facts that the real estate was devoted to rental purposes, and we have repeatedly held that such use constitutes use of the property in trade or business, regardless of whether or not it is the only property so used. *Leland Hazard,* 7 T.C. 372 (1946). See also *Quincy A. Shaw McKean,* 6 T.C. 757 (1946); *N. Stuart Campbell,* 5 T.C. 272 (1945); *John D. Fackler,* 45 B.T.A. 708, 714 (1941), aff'd (C.A. 6, 1943) 133 F. 2d 509. We add that the use of the property in trade or business was, upon the facts, an operation of the trade or business in which it was so used (see *Industrial Commission* v. *Hammond,* 77 Colo. 414, 236 Pac. 1006, 1008). It is clear, also, that the business

> was 'regularly' carried on, there having been no deviation, at any time, from the obviously planned use.'' [5]

See also *Frances S. Yerburgh Est.*, T.C. Memo. Op. Docket No. 6367, entered December 27, 1945, where the magnitude of the business is held to be not significant whereas the character of activities is.

The attention of the Court is further directed to two of its own precedents in the Ninth Circuit which seem to be favorably applicable to the contention of petitioner in the case at bar. The first is *Ehrman* v. *Com.* (CCA-9, 1941), 120 F. (2d) 607. In this case, the taxpayers, as heirs of an estate, had sold 120 lots of land in 1934 and 186 lots in 1935. The year in issue was 1935, in which they had received about $160,000 under contracts of sale. They urged that the sales were solely for purposes of *liquidation* of the inheritance, and that therefore they had derived only capital gains and were not carrying on a ''trade or business'' producing ordinary income. After declaring that it had already rejected the liquidation test in *Richards* v. *Com.* (CCA-9, 1936), 81 F. (2d) 369, and *Com.* v. *Boeing* (CCA-9, 1939), 106 F. (2d) 305, this Court cited its own language in the *Boeing* case saying:

> ''From the cases it would appear that the facts necessary to create the status of one engaged in a 'trade or business' revolve largely around the frequency or continuity of the transactions claimed to result in a 'business status' ''—citing its own decision in *Welch* v. *Solomon* (CA-9, 1938), 99 Fed. (2d) 41.[6]

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[5] This means the constant receipt for a year or more of $25 a month.

[6] Petitioner has shown above that, following Mr. Justice Holmes' rule of integration into a fagot, petitioner had great frequency or continuity of transactions in the United States resulting in the conduct of a trade or business in this country.

In the *Ehrman* case, this Court made the further highly significant statement, which must be taken to be the law of this Circuit:

> ". . . . . They [the taxpayers] refer to the property as having been acquired by them in a 'damaged' state. *We fail to see that the reasons behind a person's entering into a business* whether it is to make money or whether it is to liquidate—*should be determinative of the question of whether or not the gains resulting from sales are ordinary gains or capital gains.* The sole question is—were the taxpayers in the business of subdividing real estate? . . . . . ."
> (Emphasis supplied)

Because of the frequency or continuity of the transactions, this Court, under its own rule in *Boeing,* found the gains to have been derived from the conduct of a trade or business, although it seemed to recognize that the intention of the taxpayers in the operation was not so much to make money as to liquidate. In the case at bar, still remembering the rule of the fagot, petitioner's intention was clearly to make money on dividends while developing in the United States a program for investment as a participant in the production of recombined milk, in which it also expected to make money, buying and selling cans in transactions for the years in issue at a profit of some thousands of dollars, and cooperating in the United States through its president and other officers with other guiding representatives of petitioner at its main business office in Mexico, whether by negotiating for and obtaining loans and remitting part of the proceeds or otherwise. The number of 199 checks drawn by petitioner for the period in issue against domestic banks of itself attests to the frequency and continuity of petitioner's operations in the

United States. These operations attained the level of a trade or business under the rule of the cases just discussed.

The second precedent of this Court which seems to be favorably applicable to the contention of petitioner in the case at bar is *Lewenhaupt* v. *Com.* (CCA-9, 1955), 221 F. (2d) 227, a very recent case in which this Court affirmed *per curiam* in a short but here significant opinion the conclusion of the Tax Court below that plaintiff, a nonresident alien of Swedish nationality, had been engaged in trade or business in the United States in the year in issue (1946). This Court, referring to the findings and opinion of the Tax Court, said:

> " . . . . . The findings appear amply supported, and we are in agreement with the conclusions reached. The decision is accordingly affirmed for the reasons given by the Tax Court."

The Tax Court, in *Jan Casimir Lewenhaupt* (1953), 20 T.C. 151, had held that the taxpayer was engaged in trade or business in this country, not because of the sale by him of a tract of real property and the investment of part of the proceeds in securities, plus the ownership of additional securities, *but because of certain activities in real estate.*[7] The Tax Court said:

> " . . . . . the petitioner's activities during the taxable year connected with his ownership, and the management through a resident agent, of real property situated in the United States constituted engaging in a business. The petitioner prior to and during the taxable year, employed La Montagne as his resident agent, who, under a broad power of attorney which included

[7] In finding that there was a trade or business, the Tax Court apparently did not even find it necessary to apply in full Mr. Justice Holmes' rule of integration, which may not have been urged on it.

the power to buy, sell, lease, and mortgage real estate for and in the name of petitioner managed the petitioner's real properties and other financial affairs in this country. The petitioner, during all or a part of the taxable year, owned three parcels of improved, commercial real estate. The approximate aggregate fair market value of the three properties was $337,000. In addition, the petitioner purchased a residential property, and through his agent, La Montagne, acquired an option to purchase a fourth parcel of commercial property, herein referred to as the El Camino Real property, at a cost of $67,500. The option was exercised and title to the property conveyed to the petitioner in January, 1947.

"La Montagne's activities, during the taxable year, in the management and operation of petitioner's real properties including the following: executing leases and renting the properties, collecting the rents, keeping books of account, supervising any necessary repairs to the properties, paying taxes and mortgage interest, insuring the properties, executing an option to purchase the El Camino Real property, and executing the sale of the Modesto property. In addition, the agent conducted a regular correspondence with the petitioner's father in England who held a power of attorney from petitioner identical with that given to La Montagne: he submitted monthly reports to the petitioner's father; and he advised him of prospective and advantageous sale or purchases of property.

"The aforementioned activities, carried on in the petitioner's behalf by his agent, are beyond the scope of mere ownership of real property, or the receipt of income from real property. The activities were considerable, continuous, and regular, and, in our opinion,

constituted engaging in a business within the meaning of section 211(b)[8] of the Code. See *Pinchot* v. *Commissioner,* 113 F. 2d 718."

The parallel of the *Lewenhaupt* case to the case at bar is striking. In the latter, the activities carried on in the United States by petitioner's officers as its agents were "beyond the scope of mere ownership" of shares of stock, or "the receipt of income from" shares of stock.[9] The activities were "considerable, continuous, and regular", and therefore "constituted engaging in a business within the meaning of" section 231(b) of the Code.

It has been shown above that there were frequent negotiations by petitioner's president on American soil, to say nothing of those which he conducted abroad, looking toward the effecting of arrangements for the construction of recombined milk plants abroad, persons coming from foreign countries to see petitioner's president in the United States. If the plans entertained by petitioner had come to fruition, it would have been a principal financial participant in these operations. That they did not come to fruition was not because petitioner did not wish them so to do, but because the inconvertibility into dollars of the currencies of the various foreign countries in the premises during the years in issue as a consequence of World War II made the projects unfeasible from the standpoint of petitioner and the other entities which would have participated in the ventures, and who hoped to be able to reap their profits in a hard cur-

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[8] Sec. 211(b) was *in pari passu* with section 231(b), I.R.C. of 1939 the basic difference, apart from that of rates of tax being that the former related to alien individuals and the latter to foreign corporations.

[9] There is of course no essential difference in the determination of the question at issue between the "mere ownership" of real estate in the United States and the "mere ownership" of shares of domestic stock kept therein. The same thing is true of "the receipt of income from" the two classes of property.

rency. All this frequent activity on American soil when combined with the frequent correspondence with and trips to the head office of petitioner in Mexico constitutes the conduct of a trade or business in this country. The constant receipt of dividends in each of the three years by petitioner's statutory agent in the United States, their crediting to the account of plaintiff at one of its domestic banks in the aggregate of $1,867,385 for the period in issue, the drawing of 199 checks by petitioner in the period on American soil, the negotiations for loans and their obtention in large amounts, their repayments, and the purchases and resales of cans can all attest to continuous and significant activity.

That the cans were resold to a company controlled by petitioner's president is of no consequence, even on the assumption that although the president owned none of petitioner's stock yet petitioner and the buying company were somehow under *de facto* "common control." The propriety of such transactions, where they were fairly made, was recognized by clear implication in sec. 45, I.R.C. of 1939, by which the Commissioner was authorized to allocate income and deductions when necessary in order to prevent *evasion of taxes* or *clearly to reflect the income* of organizations under common control. Moreover, the legality of the transaction is not disputed and cannot be—See 13 Am. Jur. 954, sec. 1000, and 19 C.J.S. 166, sec. 789.

That the Tax Court should have regarded the sales of tin cans as real is attested by its own decision in *W. P. Hobby* (1943), 2 T.C. 980. In that case, the Commissioner urged that sales of shares of stock made by the petitioner therein should not be regarded as sales because they were made (in four instances) by petitioner when he knew that the shares were about to be redeemed at par by the corporation with the consequence that his gain on redemption

would have been assimilated to ordinary income (partial liquidation taxable as a short-term capital gain). In one instance, despite his knowledge, petitioner sold some of the shares to a friend at less than par, but at a gain to himself, and in the other three he sold them at par although knowing that the sale would enable the buyer instead of himself to receive an imminent dividend. The Tax Court, nevertheless, allowed petitioner to treat the sales as long-term capital gains. In rejecting the Commissioner's contention, the Tax Court said:

> "The Commissioner argues that petitioner did not in fact sell; or may not be regarded as having sold, the shares. He says that this is because the alleged sale 'had no business purpose'. What kind of 'business purpose' must be shown as necessary to the recognition of a sale is not made clear, and there is no statutory requirement to that effect. The question is not one of purpose, but whether the transactions were in fact what they appeared to be in form. *Chisholm* v. *Commissioner,* 79 Fed. (2d) 14. It is true that the sales were made at times when their effect would be to avoid the impact of the forthcoming redemption and the resulting tax. Petitioner, a shareholder, had an unrealized increment in his shares which he wanted to realize. Collaterally, he wanted to use a legitimate transaction which would impose upon him the least tax. This is not an interdicted purpose. The primary purpose to realize the gain was a legitimate business purpose, even though it also had a collateral favorable tax effect.
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> "Both intended that complete title and control should pass for a *fixed price,* — that for all purposes petitioner's ownership should end and the purchaser's

> begin with the transfer. . . . The petitioner's tax saving purpose did not invalidate the sale. Clearly the corporation could not have refused to recognize the purchaser as entitled to the redemption amount."

By comparison, it is clear that the sales of tin cans and of fat made by petitioner in the case at bar were *sales* within the Tax Court's own precedent, and when coupled with Mr. Justice Holmes' rule of integration and the varied activities of petitioner in the United States narrated above, they constituted the "engaging in trade or business in the United States".

Even if it be assumed, *arguendo*, that the taxpayer was formed in part to reduce taxes on United States income, or that it engaged in the purchase and sale of cans in order to do so, yet since the *ensemble* of its activities was a complex attracting the tag of "trade or business in the United States", *its tax reducing motive was immaterial.* This is shown in *Herbert* v. *Riddell* (DC SD, Cal., 1952), 103 F. Supp. 369.

The taxpayer had been organized under the laws of California for the purpose of producing, among other things, a motion picture from a play. The picture was produced under the taxpayer's direction, with a cast and director chosen by it, and it financed the production through a loan of $400,000.00 secured from a bank. It maintained an office, its acts were recorded, and it acted generally as a corporation, although its stock was closely owned either by another corporation or by a small group of individuals. In the language of Judge Yankwich of the District Court, the government attempted to "sublimate" certain facts and thereby induce the Court to wipe out recognition of the corporation as an entity, though the corporation in its production of the film paid out in checks more than $450,000.00, and paid Federal taxes, state taxes, and license

fees. In 1945, the year following its organization, the corporation was thrown into dissolution, and its stockholders claimed long-term capital gain treatment on their receipts in the dissolution, whereas the government denied that there was a corporate entity as a barrier to the creation of capital gains.

Judge Yankwich quoted extensively from *U.S.* v. *Chisholm* (1874) 17 Wall. 496, an old but leading decision of the Supreme Court in the tax field, his quotation being in part as follows:

> "It is said that the transaction proved . . . in this case, is a device to avoid the payment of a stamp duty, and that its operation is a fraud upon the revenue. To this objection there are two answers: 1st. That if the device is carried out by the means of legal forms, it is subject to no legal censure. To illustrate. The Stamp Act of 1862 imposed a duty of two cents upon a bank check when drawn for an amount not less than twenty dollars. A careful individual, having the amount of twenty dollars to pay, pays the same by handing to his creditor two checks of ten dollars each. He thus draws checks to the amount of twenty dollars, and yet pays no stamp duty. . . . While his operations deprive the government of the duties it might reasonably expect to receive, it is not perceived that the practice is open to the charge of fraud. He resorts to devices to avoid the payment of duties, but they are not illegal. . . . The device we are considering is of the same nature."

The District Court then declared that:

> "The principle has been reaffirmed repeatedly by the Supreme Court and by the Courts of Appeals,"

citing *Gregory* v. *Helvering* (1935) 293 U.S. 465, 469; *Superior Oil Co.* v. *Helvering* (1930) 280 U.S. 390, 395-396; *Commissioner* v. *Tower* (1946) 327 U.S. 280, 288; *U.S.* v. *Cumberland Public Service Co.* (1950), 338 U.S. 451, 455; *Howell Turpentine Co.* v. *Comm.* (1947), 5 Cir. 162 F. (2d) 319; *U.S.* v. *Cummins Distilleries Corporation* (1948) 6 Cir., 166 F. (2d) 17, 20-21.

With reference to the Supreme Court's decision in *Gregory* v. *Helvering, supra,* the District Court quoted the following from it:

> "The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether to avoid them by means which the law permits, cannot be doubted."

The District Court further said:

> "Despite the fact that in these cases, it is constantly urged that the motive to avoid taxation is important, the fact remains that, as Judge Learned Hand has stated, the Supreme Court
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> 'has never, so far as we can find, made that purpose the basis of liability' " (citing *Chisholm* v. *Commissioner,* (CCA-2, 1935) 79 F. (2d) 14).

Speaking of the domestic corporation involved in *Herbert* v. *Riddell, supra,* Judge Yankwich added:

> "So the Treasury Department is not . . . free to disregard the corporate entity where a tax benefit would result to the taxpayer. Conditions must exist which warrant the conclusion that a particular organization served *no actual business purpose* . . . "

Judge Yankwich quoted again from an opinion of the Court of Appeals for the Second Circuit:

> "The decisive question is whether the corporations were created to, or did, in fact, serve a recognizable business purpose . . ." (*O'Neill* v. *Com.* (CCA-2, 1948) 170 F. (2d) 596).

The business purpose of petitioner in the case at bar has been amply demonstrated in the record. It came into the jurisdiction through its agents (*Union Internationale, supra*) for the primary business purpose of negotiation of arrangements for the financing of recombined milk plants, which negotiations actually occurred, much of them on American soil. It negotiated for and borrowed money, it repaid loans, drew a multitude of checks, purchased and sold cans and milk fat, collected many dividends, sold securities, corresponded with the head office in Mexico and visited there. All these when added together constituted the fagot of the conduct of a trade or business. (*Edwards* v. *Chile Copper Co., supra*)

Again to quote a previous precedent of the Tax Court on the subject, it said in *John Junker Spencer* (1953), 19 T.C. 727:

> ". . . Thus when a corporate form for carrying on business is adopted and there follows an exercise of corporate powers and the doing of some business in the ordinary sense, regardless of *quantum,* the corporate entity constitutes a separate taxable entity and may not be disregarded. *Moline Properties Inc.* v. *Commissioner*, 319 U.S. 436. . ."

Under the facts shown in the case at bar, this quotation can be truthfully transposed to fit the case at bar as follows:

> ". . . Thus when a corporate form for carrying on business is adopted abroad and there follows the exercise of corporate powers and the doing of some business in the ordinary sense, regardless of *quantum,* the corporate entity constitutes a separate corporate entity taxable in the United States because of the doing of such business."

Among the cases cited by the Tax Court below in support of its decision was *Flint* v. *Stone Tracy* (1910), 220 U.S. 107, 171, holding that the word business means "busyness", and "implies that one is kept more or less busy, that the activity is an occupation". This is really in petitioner's favor. It has already been shown that there was a complex of activity by petitioner to be rolled into Mr. Justice Holmes' fagot, involving great "busyness" and an occupation when the numerous transactions already delineated are garnered into the sheaf. The corporations involved in the *Flint* case were all found to be doing business in the United States within the meaning of a Federal tax law, although one of them apparently merely owned and leased taxicabs and collected the rentals.

Snell v. *Com.* (CCA-5, 1938), 97 F. (2d) 891, simply says that the occasional sale of land held as an investment does not constitute engaging in the "business" of selling land so as to remove the parcels sold from the category of capital assets under the Revenue Acts of 1924 and 1926 in the alleged view that they were property held primarily for sale in the petitioner's trade or business. However, the Court of Appeals distinctly recognized that a taxpayer's "business" need not be his sole occupation, nor need it

take all his time, but that it may be seasonal and be carried on through agents whom the taxpayer supervises. The Court found that the taxpayer was engaged in business in another respect, in that he held considerable real estate through brokers, maintained an office for transactions connected with these activities and with the renting of buildings and the operation of a golf course, although he was usually absent from the State (Florida) during the dull season. This case seems to be wholly in favor of petitioner for reasons already advanced—the presence of petitioner's agents in the United States in the form of its officers (although subject to the supervision of the board of directors in Mexico, where petitioner was a serious, active, going concern), and the plenitude of petitioner's activities through these agents, particularly the president.

The Tax Court's quotations below from the decision in *Deering* v. *Blair.* (CCA, D.C., 1928), 23 F. (2d) 975:

> ". . . . . it is essential that livelihood or profit be at least one of the purposes for which the employment is pursued, in order to bring it within the accepted definition of the word. . ."

is also in petitioner's favor. It has been shown, to say nothing of the very large volume of domestic dividends collected in this country, that petitioner expected from the outset during the period in issue to participate very profitably on an important scale in the operation of recombined milk plants; and the profits that it realized from sales of cans exceeded in amount the profits obtained by the taxpayers in the *Handfield* and *La Greide* cases, *supra*, both Tax Court decisions. The *Deering* opinion used the language quoted in a negative way because the case involved a horse farm operated as a hobby by one of the Vanderbilts with a long and unbroken string of losses for which a

"business" deduction had been claimed—an activity in no way similar to those of the petitioner in the case at bar.

Petitioner has no quarrel with the rule of *New Colonial Ice Co.* v. *Helvering* (1934), 292 U. S. 435, cited by the Tax Court below for the proposition that deductions and credits are a matter of legislative grace, but the very point of the present argument is that plaintiff, since it was *engaged in trade or business in the United States,* is entitled to the grace.

Linen Thread Co., Ltd., supra, cited by the Tax Court below, to support the proposition that "only items accounting for a fraction of one per cent of petitioner's total income represent those which by any stretch of the imagination could be considered business" (in flat defiance of Mr. Justice Holmes' rule of integration), concerned the allegation of a Scottish corporation that it was engaged in trade or business in the United States in 1943 and 1944. The Company claimed a resident status for 1943 on the basis of two transactions and for 1944 on the basis of a mere unexecuted intention. Both the 1943 transactions were arranged by petitioner to be done in a way other than its usual way of shipping goods directly from Scotland. The first transaction consisted of a sale of crochet thread for $129.54, which was shipped to petitioner's New York office, from which the thread was delivered in the United States against the buyer's check. Petitioner's New York office was then billed from Scotland by one of petitioner's manufacturing subsidiaries there. The New York office did not solicit the sale, but was apprised of it by letter from its head office in Scotland. The second transaction consisted of a shipment from petitioner's office in Scotland to petitioner's wholly-owned subsidiary in New Jersey. Petitioner's agent in New York did not solicit the sale and did not handle the goods, but did only

the "paper work" on the transaction, which involved $600 odd, with a reported profit in the two sales of $151.58. The Tax Court found that:

> "Moreover, even if we were to assume that petitioner had a business purpose in involving its American office in these two sales, it would still be our conclusion that these two isolated transactions, profits from which constituted such a minute part of petitioner's total income from American sources in 1943, did not constitute engaging in trade or business in the United States within the meaning of section 231(a) of the Code. The test is both a quantitative and a qualitative one. *Scottish American Investment Co., Ltd., supra.*[10] The phrases 'engaged in business', 'carrying

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[10] *Scottish American Investment Co., Ltd.*, (1949) 12 T.C. 49, was decided by a badly divided Tax Court, six judges joining in a dissenting opinion delivered by Judge Opper, who thought that the foreign corporation there involved was engaged in trade or business in the United States; strangely enough, the same judge reached a contrary conclusion below in the case at bar. In his dissenting opinion in the *Scottish American* case, he said the following, with an apt quotation from the Supreme Court:

> "It seems to me impossible to reach the conclusion here enunciated and at the same time to give effect to the decision by the Supreme Court in *Commissioner* v. *Scottish American Investment Co.*, 323 U. S. 119. The following language does not strike me as dictum, but was the reasoning by which the Court arrived at its determination on the only issue it was there called upon to consider:
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> "'. . . While decisions as to the purchase and sale of American securities were made in the Edinburgh offices, there was abundant evidence that the American office performed vital functions in the taxpayers' investment trust business. The uncontradicted evidence showed that this office collected dividends from the vast holdings of American securities and did countless other tasks *essential to the proper maintenance of a large investment portfolio.* We cannot say that it was unreasonable for the Tax Court to conclude that this office . . . *was used for the regular transaction of business.* . . .'
>
> "The present facts as well as the present taxpayer were identical with those with which the Supreme Court was there dealing. If

on business', and 'doing business' were defined in *Lewellyn* v. *Pittsburgh, B. & L.E.R. Co.,* (CCA, 3d Cir., 1915), 222 Fed. 177. It was stated therein, p. 185: ' "The three expressions, either separately, or connectedly, convey the idea of progression, continuity, or sustained activity. . . ." ' "

If one erroneously considers in isolation only the stick of sales of tin cans in the case at bar in matching petitioner's activities against the legal test, nevertheless it has already been shown above that these sales were 91 in number, not *2,* and that profits of several thousand dollars were made thereon, apart from the large amounts of dividends received and the repetitive negotiations for recombined milk operations, plus the numerous other activities of petitioner set forth.

Thacher v. *Lowe* (DC SD, N.Y., 1922) 288 F. 994, a District Court decision of early income tax days, is cited by the Tax Court below for its point that in the case at bar the character of the transactions "was such that they cannot be regarded as business transactions . . . because of their obvious lack of business purpose." This case again involved a hobby farm, like *Deering* v. *Blair, supra,* involving the Vanderbilt hobby farm, and the expenses of the hobby farm, run by a lawyer as an adjunct to his country place, were over $16,000 a year as compared to income of

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petitioner transacted business in an office within the United States as the prior proceeding held and as the unmistakable language of the Supreme Court concluded, I fail to see how it is possible that it was not then and is not here transacting business within the United States. . . ."

(Emphasis in original.)

It is to be observed that the fact that the taxpayer in the *Scottish American* case was British and that Wenner-Gren in the case at bar has a Swedish background should, of course, make no difference in respect of the applicable law.

$1,100 and $1,600 respectively for the years considered. Neither hobby farm case offers any parallel to the case at bar.

Both *W. P. Hobby* (1943) 2 T.C. 980 and *John Junker Spencer, supra,* alleged by the Court below to be inapplicable, have been shown to be favorable to petitioner's contention of doing business under the fagot theory, and *Clara M. Tully Trust* (1943) 1 T.C. 611, likewise so alleged, is a similar case to the other two and susceptible of the same analysis. *Lewenhaupt, supra,* cited by the Court below for the meaning of "engaged in business", has also been shown above to be favorable to petitioner. *Marian Bourne Elbert* (1941) 45 B.T.A. 685, merely found that petitioner, describing herself as "an old-fashioned wife", was not engaged in business because she "looked after" her investments, on the authority of *Higgins* v. *Com.* (1941) 312 U.S. 212 and *U.S.* v. *Pyne* (1941) 313 U.S. 127. In the *Higgins* case, ". . . the petitioner merely kept records and collected interest and dividends from his securities, through managerial attention for his investments," living abroad in Paris. In the *Pyne* case, there was merely the administration of a large estate, with the executors "conserving" the estate and protecting its income through various transactions.

Gregory v. *Helvering, supra,* cited by the Court below for the absence of a "business purpose", involved the special "business purpose" doctrine judicially evolved in respect of corporate reorganizations and concerned a corporation brought into being as a "contrivance to trump up a "reorganization", which performed a transitory and "limited function". The Supreme Court said: "When that limited function had been exercised, it immediately was put to death." There is clearly here no parallel to the continued existence and the continued opera-

tions in the United States of the petitioner in the case at bar.

The *Ehrman* and *Snell* cases, discussed *supra,* are mentioned by the court below as showing the rule requiring "a fair degree of activity, scope and continuity in the transactions undertaken." It has been shown above how those cases in reality support the present petitioner's position.

Finally, the fact that petitioner described its principal activity as "investment" on its tax returns is of no consequence under the fagot theory explained above.

Petitioner may summarize its contentions under this subargument as follows: Petitioner agrees with the Court below that the test of "being engaged in a trade or business" requires a certain amount of activity and, moreover, agrees that there should be some profit in prospect. In addition, petitioner concedes that rather than isolated and non-continuous actions there must be some continuity and scope of action.

But unlike the Court below, petitioner vehemently asserts that the degree of activity engaged in by it during the taxable years was more than enough to constitute a trade or business. The Court's reliance below upon the fact that some transactions unfortunately resulted in either nominal profits or losses is erroneous under the Tax Court's own decisions and petitioner's analysis above.

Perhaps the most significant and fundamental error committed by the Tax Court was its transparent refusal to regard the entirety of petitioner's transactions in the resolution of the question. For example, it simply did not place any weight upon the bank negotiations, dividend collections and other financial matters which left, on the basis of the record, only the tin can transactions. These the Court simply wrote off; while "substantive" they should be

disregarded in the determination of the issue. This, petitioner submits, is clearly error.

There is also difficulty with the Tax Court's first basis for its holding, namely, "the business purpose test." Having erroneously concluded that petitioner admittedly was engaged in the business of trying to save taxes, an absurdity in itself, it failed to recognize that that purpose has been rejected by all Courts as a bar in this type of situation involving the degree of activity here present.

Finally, it may be observed that many of the cases cited by the Court below are simply inapposite. For these reasons, petitioner submits that the Tax Court erred by not holding that it was engaged in a trade or business within the meaning of Section 231(b) of the Internal Revenue Code.

B. *The Tax Court's Decision was based in significant part upon purported facts which were clearly erroneous.*

Petitioner proposes to demonstrate that certain of the Tax Court's significant findings of fact were clearly erroneous; either they were not supported by substantial evidence or they were actually contrary to the evidence.

Over and above the additional indications of petitioner's United States business activity referred to in Argument II (which were not presented to the Tax Court below and are not considered here) the Tax Court simply ignored certain uncontroverted testimony in making adverse findings of fact.

Illustrative of this type of error is the finding (R. 46) that, "Petitioner never undertook any activity in connection with the establishment of such recombined milk plants and never used its assets and borrowings for this or any related purpose."

Petitioner is unable to find support for the quoted sentence anywhere in the Record. To the contrary, the testimony of Turnbow which was not contradicted was that he devoted considerable time during the three taxable years in an effort to establish projects for the construction and operation of recombined milk plants. Assets of petitioner were used for this purpose. See Turnbow's testimony at R. 189-195.

Moreover, this finding is not an evidentiary fact. It is an ultimate fact or conclusion and, as such, need not be judged by the standard of "clearly erroneous". In such circumstances it is sufficient simply to demonstrate that the ultimate conclusion is not supported by any of the evidentiary facts.

Throughout the Record there appears to be a rather cavalier disregard of the distinction between petitioner as a corporation and Wenner-Gren as an individual. This is particularly true in connection with the original capital invested in petitioner and also with respect to various bank loans and the use of the proceeds thereof. The Court initially makes the incredible and wholly unsupported finding that petitioner represented the incorporation of part of the vast holdings of Axel Wenner-Gren, an internationally famous financier whose wealth was over one billion dollars (R. 45).

Aside from the fact that this finding is almost prejudicial, it is in part based upon admitted hearsay (see R. 221). Moreover, the finding is ambiguous in that it does not make clear whether or not Wenner-Gren is a stockholder of petitioner or whether Wenner-Gren's relationship was more remote.[11] Despite this inexactitude with respect to

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[11] See comment with respect to stock ownership of petitioner in Statement of Facts, *supra*.

a matter the Tax Court apparently regarded as significant, the Court below in a number of instances made findings with respect to Wenner-Gren which obviously should have related to petitioner. And this is done without any support from the Record at all.

For example, the Court found that "The funds borrowed by petitioner were in the main used by Wenner-Gren." (R. 49). This ultimate or conclusory fact is not supported by any of the evidentiary facts which petitioner has been able to discover in the Record. The only pertinent evidence in this respect seems to support the premise, as stipulated, that petitioner used the funds. (See R. 26-34)

Again, on page 48 of the Record, the Court found that, "In May it [petitioner] borrowed $1,000,000 from Bank of America, which Wenner-Gren used in acquisition of Mexican telephone companies." Petitioner is unable to find any support for this finding in the stipulation or the testimony.

In the same paragraph of the findings the Court below also found that, "On August 6, it (petitioner) borrowed $1,850,000 from the Bank of America, of which it used $1,100,000 to repay prior indebtedness of Wenner-Gren to the Bank, which petitioner had assumed." The reference in this finding to the "prior indebtedness of Wenner-Gren" is entirely gratuitous and tends to give an erroneous impression. Shortly after petitioner was incorporated in 1947, Wenner-Gren had transferred title to sizable blocks of Servel and Electrolux stocks to petitioner in exchange for petitioner's shares. At the time of the transfer the Servel and Electrolux blocks of stock were hypothecated to a bank to secure a loan. As part of the consideration for the title to the stock, petitioner not only issued its own shares to Wenner-Gren but also assumed his liability to the bank for which the shares had been pledged. At the time of the repayment described in the sentence under con-

sideration, the indebtedness was no longer that of Wenner-Gren but that of petitioner and hence any reference to the fact that it was a prior indebtedness of Wenner-Gren is legally of no importance, but perhaps indicative of the Tax Court's attitude where Wenner-Gren semed to be on trial. In passing, it is the understanding of counsel that after Wenner-Gren received petitioner's shares they were almost immediately transferred to another corporation in exchange for its shares. However, this information does not appear in the Record in this case although it should have appeared. Apparently, the Tax Court regarded the stock ownership in petitioner as of some significance and has ambiguously straddled the problem by finding (R. 45) that petitioner "represented" the incorporation of part of the vast holdings of Axel Wenner-Gren, whatever "represented" may mean.

On page 50 of the Record the Court found that, "In December, 1948, petitioner undertook to place with Western, *in its own name,* an order covering precisely the same type of cans, etc." The unnecessary phrase, "in its own name" suggests some distinction with an order placed by petitioner in somebody else's name. There seems to be no basis for such distinction in the Record and this peculiar emphasis may be simply preparation for the later refusal of the Tax Court to recognize a business purpose in the can transactions of petitioner, even though it was held that they were "substantive".

The Court below also found that petitioner never used the Oakland address on its letterheads or otherwise and paid no rent for the Oakland office, and in the same vein it also found that from 1948 through 1950 petitioner had no paid employees in the United States. (R.45-46). These findings disregard the testimony of Turnbow to the effect that he held conferences with foreign interests regarding

erection of recombined milk plants abroad at the Oakland office. This would certainly constitute use of the Oakland address "otherwise". (See R. 120-123 and 192-193)

The fact that petitioner paid no rent for the Oakland office would appear to be of no significance. The fact is that undoubtedly some of the office overhead would be chargeable to petitioner due to the time and activities of both Turnbow and his secretary. Incidentally, Exhibit XXXI attached to the stipulation of facts contains a not insignificant tabulation of office and miscellaneous expenses, among which may be identified items such as postage, insurance, telephone and telegraph, legal expenses, printing and photostating, as well as travel. With respect to the "no paid employees" the Court simply refused to accept the fact that Turnbow was paid $1,500 per month during the last six months of 1950 by petitioner as salary.

The Tax Court did not specifically advert to the fact that, in addition to the official, paid resident agent in Reno, Nevada, petitioner had three officers resident in the United States during the taxable years. These include Turnbow, petitioner's president, M. W. Dobrzensky, vice-president (R. 44) and Franklin A. Schulze, secretary-treasurer. (See petitioner's tax returns placed in evidence through supplemental stipulation of facts, R. 40, 179).

In conclusion, it is asserted that the Tax Court's findings of fact were in part inaccurate, incomplete and not based upon substantial evidence. In the Statement, *supra,* petitioner has deleted those findings of the Tax Court which it believes to be clearly in error and has modified or corrected other findings as indicated there. Some of the facts thus modified, corrected or deleted represent conclusory facts rather than evidentiary facts, while some are evidentiary facts themselves. As to the latter, petitioner submits that where challenged they are clearly erroneous as discussed above.

ARGUMENT II

The Tax Court Improperly Refused to Relieve Petitioner of Its Judgment and, Therefore, the Case Should Be Remanded for Further Proceedings.

This argument relates to the Tax Court's discretion. It refused to relieve petitioner of its judgment on the grounds of mistake, inadvertence, newly discovered evidence or any other ground. If this Court should decide this argument for petitioner, the case should be remanded to the Tax Court to take further testimony with respect to the trade or business activities of petitioner in the United States during the taxable years and the first question need not be answered at this time.

The decision of the Tax Court was filed on September 4, 1957. Petitioner retained new counsel to prosecute an appeal to this Court on October 21, 1957. In the course of the examination of the record below and files relating to petitioner's suit in the Tax Court, new counsel became convinced that neither a complete nor entirely accurate presentation of facts had been made below.

The principal issue below turned upon the scope of petitioner's activity in the United States. Inexplicably, there were omitted from the record at least eight pertinent United States activities of petitioner in the taxable years carried on through its officers or agents.

It also appears that Axel Wenner-Gren, the principal at interest, had not been advised of the trial in the Tax Court nor had he been invited to be a witness therein. Significantly, the principal witness on behalf of the petitioner was Grover Turnbow, petitioner's former president, who had fallen out with Wenner-Gren and had settled that dispute in 1950 upon receipt of $105,000.00 in cash and securities from Wenner-Gren. (R. 46) One of the counsel in

the Tax Court proceeding had been a vice-president of petitioner as well as its attorney. (R. 44) It also appears that some of the transactions which could have been testified to, but were not mentioned at the trial, were well known to Grover Turnbow and in fact, had been participated in by Turnbow himself.

To cap the climax, it appears that there was a misunderstanding between petitioner's counsel and the Judge of the Tax Court to the point that the Tax Court Judge believed that the petitioner had admitted that its conduct was not motivated by business objectives but purely by a desire to save taxes. (R. 54) Strangely enough, petitioner's counsel had specifically disavowed any such position in its opening statement (R. 102) but upon brief took a position that cast doubt upon this proposition (Petitioner's Opening Brief, p. 34-5.) In any event, the Judge of the Tax Court regarded the tax avoidance motive as one of the two significant factors in deciding the case. If petitioner's counsel below really intended to make the admission it was tantamount to conceding the issue (even if inadvertently) in the view of the Tax Court Judge.

Against this background, petitioner's new counsel filed a motion on November 19, 1957 for leave to file a motion to vacate decision, to reopen the proceeding, and to take further testimony. Supporting affidavits accompanied the motion. The motion for leave to file was placed on the Tax Court motion calendar and was argued in Washington, D. C. on November 27, 1957, one week prior to the expiration of the appeal period. At the motion argument respondent's counsel opposed the motion which was denied by the Court. Thereupon this appeal was filed.

At the motion argument, petitioner's counsel offered to place on the stand two persons then in the courtroom (Messrs. O'Connell and Grenninger) who were officers

and directors of petitioner during the taxable years, with personal knowledge of its United States activities. Neither had testified at the Tax Court trial. Respondent objected and the Court sustained the objection, refusing to hear any testimony, upon which petitioner's new counsel made an offer of proof (R. 271-281).

Among the matters thus offered were the following:

1) In 1949 a race track in Mexico City known as The Hippodrome was owned and operated by petitioner. During 1949, Turnbow conducted extensive negotiations in the United States in an attempt to sell the controlling interest in that race track. A sale was not consummated as a result of these negotiations, although time and activity were involved.

2) Also during 1949, Turnbow and others negotiated to sell in the United States a subsidiary of petitioner. The subsidiary was The Bank Continental. Negotiations were conducted in New York City by an officer of petitioner for this purpose.

3) In 1949, a concern known as Pan-American Trust Company, beneficially owned or controlled by petitioner, was sought to be sold in New York City and in this connection negotiations again were conducted with New York banks.

4) Also in 1949, Turnbow conducted negotiations with Tidewater Oil Company in the United States in an attempt to get them to enter the oil business in Mexico under the auspices of petitioner.

5) During the same year Turnbow tried to interest petitioner in buying the stock of the Golden State Dairy in California. That dairy is now merged into Foremost Dairies, of which Turnbow is now president. It is one of the largest milk combines in the world.

6) In 1948, petitioner loaned more than $600,000.00 to two of its subsidiaries in Mexico to permit them to purchase dehydrated milk powder in carload quantities in the United States.

7) In 1948, negotiations were conducted in New York City with a factor in an attempt to obtain a loan of $350,000.00 in connection with milk operations of petitioner in Mexico.

8) During 1948, 1949 and 1950 continuous negotiations were under way, conducted in greater part by Wenner-Gren, in an attempt to merge the two largest telephone companies in Mexico into one concern. One of these companies was a subsidiary of a United States company, The International Telephone and Telegraph Company. Over a period of three years and under specific authorization by the Minutes of petitioner, Wenner-Gren negotiated in New York and finally, acquisitions were made by petitioner in 1950 and mergers were consummated. Wenner-Gren visited the United States on several occasions and negotiated extensively with the parent corporation in the United States.

Nothing in the Tax Court record indicates the general purposes of the formation of petitioner and the world wide nature of its activities as originally envisaged. Available evidence was not introduced to show that it was intended primarily to engage in the dehydrating of milk products to be purchased principally in the United States and then recombined to form whole milk in various portions of the world. All of this was to be carried on under the auspices of the United Nations.

The record is bare of any reference to the over-supply of milk in the United States during the taxable years and the resulting give-away programs followed by this government which nullified the original plans of petitioner and resulted in it diversifying its activities. No use was made

at the Tax Court trial of corporate minute books, account books, or other available records including stock record books, and as a result data conventionally found in such sources is lacking in this case. More significant, the only petitioner witnesses used at the trial were Grover Turnbow, who by that time had severed his connection with the petitioner and was apparently inclined to be hostile to Wenner-Gren, and Marian Palmer, Turnbow's personal secretary. No testimony was offered by informed persons such as Axel Wenner-Gren, Birger Strid, O'Connell, and Grenninger. Finally, no systematic attempt was made to relate various disbursements and deposits reflected in the checking accounts with otherwise significant transactions.

The impression is unavoidable that an incomplete presentation of facts was made to the Tax Court, and that, moreover, some of the facts were inadequately if not inaccurately presented. Unfortunately, all of these derelictions go to the question of the scope of activity engaged in by petitioner during the taxable years in the United States. It is against this background that the argument is raised here that the Tax Court erred by failing to relieve the petitioner of the Court's judgment and reopen the proceeding to take *all* of the available and pertinent testimony.

The first question which arises is, under what circumstances will the Tax Court vacate a decision and grant a new trial. Tax Court Rule 19 relating to motions is purely mechanical and is no aid in determining the standards to be applied. Petitioner has been unable to identify any significant standards in decided cases. In view of the fact that what is involved here is evidence, reference is made to Tax Court Rule 31 relating to evidence.

In subparagraph (a) of that Rule it is stated that trials before the Tax Court will be conducted in accordance with the rules of evidence applicable in trials without a jury in the United States District Court for the District of Columbia. The second sentence of this same subsection refers the reader to Rule (43b) of the Rules of Civil Procedure in the case of unwilling or hostile witnesses in Tax Court trials. The fact that the Tax Court rule of evidence is based upon that applicable in non-jury trials in the District Court of the District of Columbia echoes Section 7453 of the 1954 Internal Revenue Code. The rules of evidence applicable under such circumstances are the *Rules of Civil Procedure* for the United States District Courts. It may be observed in passing that this reference to the *Rules of Civil Procedure* is regarded by the leading text writer in Federal tax matters (Mertens Code Commentary, *Law of Federal Income Taxation,* Sec. 7453:1) as a *modification* of the rule contained in prior law.

Under the 1939 Code rules of evidence applicable by reference were those within the jurisdiction of the Courts of equity of the District of Columbia.

Turning to the *Rules of Civil Procedure,* helpful and controlling precepts are found in Rule 60, "Relief From Judgment or Order". Subparagraph (b) thereof describes the circumstances under which a court may relieve a party from a final judgment. Among the circumstances there mentioned are mistake, inadvertence, excusable neglect, newly discovered evidence, or any other reason justifying relief from operation of the judgment.

It has been pointed out that "concession" by petitioner's counsel in the Court below that petitioner had no business purpose but only a desire to save taxes when it engaged in business in the United States was tantamount to defaulting on the major issue below. (R.54) In *Elias* v. *Pitucci* (DC

ED Pa., 1952) 13 F.R.D. 13, it was held that a default would be set aside where it was caused by a mistake of prior counsel in believing that an answer was not required to be filed and present counsel, upon learing of that mistake, had acted promptly and defendant had a meritorious defense.

Again assimilating the apparent concession by petitioner's prior counsel in the Court below to a default, a somewhat analagous case is found in *Tozer* v. *Charles A. Krause Milling Co.,* (CCA-3, 1951) 189 F. (2) 242. In that case the Third Circuit, discussing Rule 60(b) of the *Rules of Civil Procedure,* held that it should receive a liberal construction. Moreover, matters involving large sums of money should not be determined by default judgments if that could reasonably be avoided. Any doubt should be resolved in favor of the moving party under the rule to set aside the judgment so that the case could be decided on the merits. In that case a default judgment had been entered in a Federal Court in Pennsylvania against the defendant, a foreign corporation which had not given proper notice of address for service of process to the Secretary of the Commonwealth. The defendant in its motion showed a defense which, if proved, would defeat the claim. The District Court was held to have abused its discretion in refusing to vacate the default judgment.

Whether, under the facts as set forth above, it may be held that there was in this case mistake, inadvertence, newly discovered evidence, or "any other reason justifying relief" is for this Court to decide. The evidence sought to be presented to the Court was not merely cumulative and had a direct and material bearing upon the basic issue presented. There is a reasonable basis for believing that, had the additional testimony been available to the Court below, that Court would have reached an opposite result. It would

be unjust to have this matter disposed of adversely without full consideration of all available evidence. This Court's statutory mandate and power to decide cases "as justice may require" is adequate assurance of an ultimate result which is fair. Petitioner simply cannot avoid the conclusion that the Court below reached a wrong conclusion based upon incomplete and partially inaccurate facts. For these reasons it is concluded that the Court below abused its discretion by denying petitioner's motion for relief from judgment. This cause should, therefore, be remanded for further proceedings on the merit issue (Argument I).

ARGUMENT III

Petitioner Is Entitled to Deduct Interest, Expenses and Losses on Sale of Property in the Taxable Years.

The Court below regarded this question as a subordinate issue, to be reached only if petitioner prevailed on the argument relating to trade or business within the United States. Because the Court below held that petitioner was not engaged in such trade or business, it neither reached nor decided this question.

This Argument is designed to protect petitioner's rights to assert seasonably its contentions with respect to interest, expenses and losses. Because the Court below did not decide anything with respect to this issue nothing can be urged before this Court. Petitioner regards this issue as parallel to the trade or business issue and concedes that it should be disposed of on the same basis as the trade or business issue. That is, if petitioner was engaged in trade or business it is entitled to deduct the interest, expenses and losses connected with income from sources within the United States. Otherwise it should lose this issue. Thus, if petitioner should prevail on Argument I it should prevail here. Should this case be remanded for reconsideration of Question I relating to trade or business activities, then petitioner would wish to submit this question. This argument is, therefore, intended to show that this issue is neither abandoned nor conceded by petitioner.

Conclusion

Petitioner concludes and requests this Court to hold that:

(a) Petitioner should be sustained on Argument I and, therefore, the holding of the Tax Court should be reversed

and petitioner should also be sustained on Argument III; or

(b) the case should be remanded to the Tax Court for further proceedings on Arguments I and III; or

(c) petitioner should be sustained on Argument II and the case remanded for further proceedings on Arguments I and III.

Respectfully submitted,

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"APPENDIX"

APPENDIX A

Statutes and Regulations

STATUTES

INTERNAL REVENUE CODE OF 1939

SECTION 13. TAX ON CORPORATIONS IN GENERAL.

(a) DEFINITIONS.—For the purposes of this chapter——

* * * * *

(2) Normal-Tax Net Income.—The term "normal tax net income" means the adjusted net income minus the credit for dividends received provided in section 26(b).

SEC. 14. TAX ON SPECIAL CLASSES OF CORPORATIONS.

* * * * *

(c) FOREIGN CORPORATIONS.

(1) In the case of a foreign corporation engaged in trade or business within the United States, the tax shall be an amount equal to 24 per centum of the normal-tax net income regardless of the amount thereof.

(2) In the case of a foreign corporation not engaged in trade or business within the United States, the tax shall be as provided in section 231(a).

SEC. 15. SURTAX ON CORPORATIONS [Effective 1948 and 1949]

(a) Corporation Surtax Net Income.—For the purposes of this chapter, the term 'corporation surtax net income' means the net income minus the credit for dividends received provided in section 26(b) . . .

(b) Imposition of Tax.—There shall be levied, collected and paid for each taxable year upon the corporation surtax net income of every corporation (except . . . a corporation subject to a tax imposed by section 231(a) . . .) a surtax as follows:

(1) Surtax net incomes not over $25,000.—Upon corporation surtax net incomes not over $25,000, 6 per centum of the amount thereof.

(2) Surtax net incomes over $25,000 but not over $50,000.—Upon corporation surtax net incomes over $25,000, but not over $50,000, $1,500 plus 22 per centum of the amount of the corporation surtax net income over $25,000.

(3) Surtax net incomes over $50,000.—Upon corporation surtax net incomes over $50,000, 14 per centum of the corporation surtax net income.

"Sec. 15. Surtax on Corporations. [Effective 1950]

"(a) Corporation Surtax Net Income.—For the purposes of this chapter——

(1) Calendar year 1950 . . . —In the case of a taxable year beginning on January 1, 1950, and ending on December 31, 1950, . . . the term 'corporation surtax net income' means the net income minus the sum of the following credits:

(A) The credit for dividends received provided in section 26(b):

* * * * *

"(b) Imposition of Tax.——

* * * * *

(2) Calendar year 1950.—In the case of a taxable year beginning on January 1, 1950, and ending on

December 31, 1950, there shall be levied, collected, and paid for such taxable year upon the corporation surtax net income of every corporation (except a corporation subject to a tax imposed by section 231(a) . . .) a surtax determined by computing a tentative surtax of 19 per centum of the amount of the corporation surtax net income in excess of $25,000, and by reducing such tentative surtax by an amount equal to 1 per centum of the lower of (A) the amount of the credit provided in section 26(a), or (B) the amount by which the corporation surtax net income exceeds $25,000.

* * * * *

"SEC. 26. CREDITS OF CORPORATIONS.

"In the case of a corporation the following credits shall be allowed to the extent provided in the various sections imposing tax——

* * * * *

(b) DIVIDENDS RECEIVED.—An amount equal to the sum of——

(1) In general.—85 per centum of the amount received as dividends . . . . . from a domestic corporation which is subject to taxation under this chapter; . . . . . "

SEC. 231. TAX ON FOREIGN CORPORATIONS

(a) NONRESIDENT CORPORATIONS

(1) IMPOSITION OF TAX.—There shall be levied, collected, and paid for each taxable year, in lieu of the tax imposed by sections 13 and 14, upon the amount received by every foreign corporation not engaged in trade or business within the United States, from

sources within the United States, as interest (except interest on deposits with persons carrying on the banking business), dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income, a tax of 30 per centum of such amount, except that in the case of corporations organized under the laws of any country in North, Central, or South America, or in the West Indies, or of Newfoundland such rate with respect to dividends shall be reduced to such rate (not less than 5 per centum) as may be provided by treaty with such country.

* * * * *

(b) Resident Corporations.—A foreign corporation engaged in trade or business within the United States shall be taxable as provided in section 14(c)(1) and section 15.

Swedish-United States Income Tax Convention

* * * * *

Article VII

1. Dividends shall be taxable only in the contracting State in which the shareholder is resident or, if the shareholder is a corporation or other entity, in the contracting State in which such corporation or other entity is created or organized; provided, however, that each contracting State reserves the right to collect and retain (subject to applicable provisions of its revenue laws) the taxes which, under its revenue laws, are deductible at the source, but not in excess of 10 per centum of the amount of such dividends. . . . ."

Protocol

* * * * *

3. A citizen of one of the contracting States not residing in either shall be deemed, for the purpose of this Convention, to be a resident of the contracting State of which he is a citizen.''

REGULATIONS

REGULATIONS 111—INCOME TAX

SEC. 29.231–1 TAXATION OF FOREIGN CORPORATIONS.—

For the purposes of this section and sections 29.231–1, 29.232–1, 29.235–1, 29.235–2, and 29.236–1, foreign corporations are divided into two classes: (a) foreign corporations not engaged in trade or business within the United States at any time within the taxable year, referred to in the regulations as nonresident foreign corporations (see section 29.3797–8); and (b) foreign corporations which at any time within the taxable year are engaged in trade or business within the United States, referred to in the regulations as resident foreign corporations (see section 29.3797–8).

(a) Nonresident foreign corporations.—A nonresident foreign corporation is liable to the tax upon the amount received from sources within the United States, determined under the provisions of section 119, which is fixed or determinable annual or periodical gains, profits, and income. For the purposes of section 231(a), the term "amount received" means "gross income." Specific items of fixed or determinable annual or periodical income are enumerated in the Internal Revenue Code as interest (except interest on deposits with persons carrying on the banking business), dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, but other fixed or determinable annual or periodical gains, profits, and income are also subject to the tax, as, for instance, royalties. As to the definition of fixed or determinable annual or periodical income, see section 29.143–2.

* * * * *

The fixed or determinable annual or periodical income from sources within the United States including royalties, of a nonresident foreign corporation is taxable at the rate of 30 percent (27½ percent as to such income received prior to October 31, 1942). In the case of dividends received by a nonresident foreign corporation organized under the laws of any country in North, Central, or South America, or in the West Indies, or of Newfoundland, the rate shall be reduced to such rate (not less than 5 percent) as may be provided by treaty with such country.

(b) Resident foreign corporations.—A resident foreign corporation is not taxable upon the items of fixed or determinable annual or periodical income enumerated in section 231(a) at the rate specified in that section. A resident foreign corporation is, under section 14(c)(1), liable to a tax of 24 percent of its *normal tax* net income (regardless of the amount thereof), that is, its net income from sources within the United States (gross income from sources within the United States minus the statutory deductions provided in sections 23 and 232) less the credits allowed against net income by section 26(a) and (b). A resident foreign corporation is also liable to the corporation surtax at the following rates:

(1) Upon corporation surtax net incomes of $25,000 or less, 10 percent of the amount thereof.

(2) Upon corporation surtax net incomes over $25,000 but not over $50,000, $2,500, plus 22 percent of the amount of such income in excess of $25,000.

(3) Upon corporation surtax net incomes of more than $50,000, 16 percent of the entire amount thereof.

The corporation surtax net income of a resident foreign corporation is its net income from sources within the United States less the credit allowed by section 26(b), which credit

is limited in amount to 85 percent of its net income from sources within the United States.

As used in sections 119, 143, 144, 211, and 231, the phrase "engaged in trade or business within the United States" includes the performance of personal services within the United States at any time within the taxable year. Such phrase does not include the effecting of transactions in the United States in stocks, securities, or commodities (including hedging transactions (through a resident broker, commission agent, or custodian. The term "commodities" as used in section 211(b) means only goods of a kind customarily dealt in on an organized commodity exchange, such as a grain futures or a cotton futures market, and does not include merchandise in the ordinary channels of commerce.

APPENDIX B

EXHIBITS *

Description	Identified	Offered	Received
1 through 31 (attached to Stipulation of Facts) ..	92	92	92
A, B, C (attached to Supplemental stipulation of Facts)	93	93	93
32	124	125	125-6
33	132	138-9	139
34	132-3	133	138
35	139-40	140	142
36	146-7	147	149
D	227-8	229	229
E	241-2	241	242-3

* In accordance with Rule 18, Subdivision 2(f).